91-175

FILED
JUL 29 1991
OFFICE OF THE CLERK

NO._____

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1990

JOHN BURCHE,
Petitioner
v.
DEGUSSA CARBON BLACK CORP.,AND
ASHLAND CHEMICAL CO.,
Respondents

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOHN BURCHE Petitioner Pro Se
5210 Division St.
Davenport Iowa 52806
(319) 386 4736

QUESTION PRESENTED

Where the rights of petitioner pro-se John Burche, under Seventh and Fourteeth Amendments violated by the Trial Court's findings, affirmed by the United States Court Appeals for the Sixth Circuit, when failed to consider abuses committed toward him?

Such abuses are as follows:

1. Denial of jury trial by the Trial Court;
2. Denial of a complete discovery by the Trial Court;
3. Unfulfilled obligations of respondents toward relocation of petitioner from Iowa to Ohio, connected with his employment;
4. Demotion of petitioner by respondent-Ashland when he requested disciplinary action toward an employee who insulted the petitioner;
5. Termination of employment for petitioner, two days later after he wrote a letter to his employer, respondent-Degussa where he presented unjustices made to him during his employment concerning his relocation and demotion.

TABLE OF CONTENTS

Questions Presented----------i

Table of Contents----------ii

Index of Authorities----------iii

Opinions Below---------- 2

Grounds of Jurisdiction of Supreme Court---------- 2

Applicable Constitutional Provisions- 2

Statement of the Case---------- 3

Reasons for Granting the Writ-------- 15

Conclusion---------- 24

Certificate of Service---------- 25

Appendices---------- 26

A. Judgement Entry of United States District Court Northern District of Ohio Eastern Division----------A1

B. Opinion of the United States Court of Appeals for the 6th Circuit----------B1

C. Denial of Rehearing En Banc by the United States Court of Appeals for the 6th Circuit----- C1

INDEX OF AUTHORITIES

Cases:

Baker v. Amoco Oil Co.,751 F.Supp.1357--16

Bilkowski v. Merril Lynch Inc.,
866 F.2d 821----------20

Buesher v.Auto Lite Battery Corp.,
11 F.R.D.514----------16

Galloway v. U.S. 63 S.Ct.1077,
319 U.S. 372, 87 L.Ed.1458----------16

Good v.Zenith Electronics Corp.,
751 F.Supp. 1320----------20

Green v. Institute Unit Mgmt.,
748 F.2d 827----------18

Johnson v. U.S. 63 S.Ct.549,
318 U.S. 189----------24

Local 783 AFL-CIO v. General Electric
Co., 471 F.2d 751, 38 L.Ed.2d 55--------15

Marshal v. TRW Inc.,Rada Pump Division
900 F.2d 1517----------18

Mers v. Dispatch Printing Co.,
498 N.E.2d 150 (Ohio S.Ct.1985)--------17

McClatchy Newspaper v. Superior Ct.,
209 Cal.Rptr.598 (1985)----------17

Misco Inc. v.U.S.Steel Corp.,
784 F.2d 198,205 (6th Cir. 1986)--------16

Mizell v. North Broward Hospital
427 F.2d 468----------22

National Ass'n Of Broadcasters v.
F.C.C.,1976, 554 F.2d 1118----------23

Ott v. Middland Ross Corp.,
600 F.2d 24----------20

Palmigrano v. Mullen 491 F.2d 978------23

Perez Serrano v. De Leon Velez
868 F.2d 30----------16

Riddel v.Ridell Washington Corp.,
866 F,2d 1480----------22

Roman Ceramics Corp., v.People's
Nat'l Bank 714 F.2d 1207,1214----------20

Silber v. U.S.App. D.C., 82 S.Ct.
1987,370 U.S. 717,8 L.Ed.2d 798--------24

Slavin v. Curry 574 F.2d 1256,
583 F.2d 779,102 L.Ed.2d 469----------22

Sowell v. Israel 500 F.Supp.209--------22

Universal Computer Systems Inc.,
Medical Services Assoc. of
Pennsylvania 628 F.2d 820----------17

White v. Western Title Ins.,
710 P.2d 309----------23

Wright v. Farmers' National Corp.,
74 F.2d 425----------17

STATUTES

28 U.S.C.A.,

Section 1254----------16

Section 1257----------2

STATUTES (Continued)

29 U.S.C.A. Section 158---------- 21

31 U.S.C.A. Section 9307---------- 17

42 U.S.C.A.,

Section 183---------- 23

Section 1981---------- 16

Section 1983----------16

CONSTITUTION

United States Constitution

Seventh Amendment----------16

Fourteenth Amendment Section 1----------22

NO._____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

JOHN BURCHE,

Petitioner,

v.

DEGUSSA CARBON BLACK CORP.,

and ASHLAND CHEMICAL CO.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, John Burche, prays that a Writ of Certiorari issue to review the opinion and the judgement of the United States Court of Appeals for the 6th Circuit entered in this proceeding on March 19,1991, was unchanged by denying the Petition for Rehearing En Banc on May 10,1991.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reproduced herein as Appendix "B" to the petition.

The order of the United States Court of Appeals for the Sixth Circuit denying Rehearing En Banc is reproduced herein as Appendix "C" to this petition.

JURISDICTION

The order of the United States Court of Appeals for the Sixth Circuit denying Rehearing En Banc was entered on May 10, 1991. A copy is reproduced herein as Appendix C. This Petition for Writ of Certiorari was filed less than 90 days from the date of aforesaid. The jurisdiction of the Court is invoked under 28 U.S.C.Section 1257(3).

APPLICABLE CONSTITUTIONAL PROVISIONS

Constitution of the United States 7th

Amendment:

"In suits for common law where the value of controversy shall exeed twenty dollars,the right of trial by jury,shall be otherwise reexamined in any Court of the United States,than according to the rules of the common law:..."

Constitution of the United States 14th

Amendment, Section 1:
" Citizenship--- Due process of law--- Equal protection---. All persons born or naturalized in the United States and subject to the jurisdiction therof are citizens of the United States and to the states wherein they reside. States are prohibited from abridging priviledges or immunities of citizens of United States,or depriving any person of due process of law or equal protection of the laws."

STATEMENT OF THE CASE

To the end of January 1988,a recruiter hired by respondent-Ashland called petitioner at work and later on at home asking if petitioner would consider an employment for respondent-Ashland. After a detailed conversation concerning the offered position,petitioner gave an affirmativ answer and agreed to enter into negociations with respondent-Ashland.

Two interviews were taking place,one on February 16, and the second on March 4, 1988.During the second interview were made verbal and written promises to petitioner by respondent-Ashland's representatives concerning a job offer.

Written Promises:

1.That petitioner would be hired as Manager R& D (offer made by J.M Graham) with a salary of $58,600/Year, representing no change in petitioner's income.

2.Thac petitioner would be helped to relocate from Davenport Iowa to Akron Ohio. Such relocation included sales of old house and buying a new house. On depressed areas respondent applies Amended sales Value Policy.

3. That petitioner would benefit from profit sharing and pension plan as part of his employment package.

Verbal Promises:

1. That petitioner would be hired as Director R&D.

2.That respondent buys petitioner's house in Davenport at the cost price,due to a depressed real-estate in that area.

3. That petitioner could work if he wishes as consultant for respondent after his retirement.(Petitioner at that time was 58 years old).

4.That a total of eight professional people would report to petitioner,and adequate help would be given to acquire modern equipment for R&D work.

Petitioner relying on ferm oral and written promises,made by respondent's representatives,accepted the employment offer, and informed them that he would resign from his employer Bandag Inc. after 17 years of employment, just seven years away from retirement. Petitioner did not gain financial advantages through such job

but was impressed about his future professional activity in carbon black and rubber technologies.

Petitioner started to work for respondent-Ashland on March 21,1988, committed to perform a good job, following a research program, working 11-12 hrs/day including most Saturdays.

On September 9,1988,his supervisor J.M.Hugg wrote concerning petitioner's Review of Accomplishments "John Burche is very effective,very conscientious worker who is doing a very good job,it is a pleasure working with him."

However while petitioner trying to perform a good job he noticed serious discrepancies between facts and promises made to him by respondent-Ashland when he was hired such as:

Petitioner got business cards as Director R&D,as it was verbally promised, but found

out,that his real title was Manager R&D. He did not receive,in accordance with respondent's relocation policy,any written offer to buy petitioner's house from Davenport Iowa. Only a verbal offer of $70,000 has been made to petitioner, for his house built in 1981 at a cost of $115,000. Petitioner suggested a compromise to get $95,000 for his house, in order to reduce the loss to about $20,000 renouncing to recover the whole cost price as it was promised by respondent's representatives. Petitioner's offer has been treated with no answer by respondent,declining in this way to use relocation clause "Amended value sales" allowing to pay the cost price for a house of a relocated employee,when the market price was below the cost price as it was in Davenport area for petitioner's house.

For such unfair treatment,petitioner expressed in writing and verbally a total un-

satisfaction about his relocation.

Some of the professional people reporting to petitioner, were used only 30 percent for R&d work, and the rest of their time it has been used for marketing and quality assurance work, per assignments given by the petitioner's supervisor.

In 1988, and before, negociations were in process to sell respondent-Ashland's Carbon Black Division to Degussa A.G., a German corporation. Petitioner was assured during his interviews that selling of Carbon Black Division was out question in spite of various rumors circulating around within business circles.

Respondent-Ashland tolerated acts of insubordination allowing some employees to insult petitioner without taking any disciplinary actions suggested by petitioner. As soon as petitioner expressed in writting his disagreement toward his supervisor J.M.Hugg about such unproductive ways to

solve disciplinary problems, a defamation campaign has been initiated against petitioner starting November 14,1988,by the same supervisor who quoted petitioner on 9/9/88 "A very effective performer".

On November 28,1988, petitioner has been demoted from Manager R&D, to Senior Research Chemist. On November 29,1988,one day after petitioner's demotion, respondent-Ashland's Carbon Black Division has been sold to respondent-Degussa,a subsidiary of Degussa A. G.,but it was maintained the same management, and consequently the retaliation did continue against petitioner by the same people.

During petitioner's employment for respondent-Degussa,as Senior Research Chemist, between 11/29/1988 to 3/22/1989, when petitioner's employment has been terminated,he was like an undesirable person in spite of his efforts to generate creative things,

suggesting through his technical papers, substantial contributions for R&D work, but nobody was interested for such work.

On March 20,1989,petitioner wrote a letter to respondent-Degussa expressing his unsatisfaction about his demotion,and relocation being still in limbo. Two days later on March 22,1989, his employment has been terminated by respondent- Degussa,managed by the same people tranferred from respondent-Ashland through sales of its Carbon Black Division.

Several tentatives to reach a termination settlement with respondent-Degussa did fail because of lack of interest from respondent.

On May 25,1989,a complaint has been filed by petitioner as pro-se,at the U.S.District Court Northern District of Ohio,case no. 5 89CV0981,against respondent-Degussa.

Through the process of discovery,petitioner noticed a total lack of cooperation from previous employer respondent-Ashland toward

discovery process,as well as Court's reluctancy to enforce petitioner's request for such discovery. In several occasions petitioner has been quoted by the Court as incapable to represent pro-se.

On 7/28/1989,a motion has been filed to District Court for an amended complaint to add Ashland Chemical Co. as codefendant. Such motion has been granted on 9/1/1989.

On 8/8/1989,a motion requesting a jury trial has been filed but denied on 8/22/89.

On 10/2/1989, a second motion for jury trial has been filed, but denied again on 10/16/1989. The reason of requesting a jury trial along with the amended complaint has been dictated by the unwillingness of respondents to cooperate for a complete discovery,and by the Court reluctancy to issue an order for compelling defendants in producing requested documents,and answer to interrogatories.

In spite of an incomplete discovery, district court granted on 3/6/1990, a Summary Judgement to respondent-Degussa based on the fact that petitioner's employment has been terminated by respondent-Degussa because petitioner has signed a service agreement with previous employer respondent-Ashland,and his employment was at will employment. Summary Judgment for respondent-Ashland has been denied,but the trial has been limited only to the issue of compensatory damages for petitioner house in Davenport Iowa.

On June 19,1990,a judgment has been entered by the district court in favor of respondent-Ashland pursuant to F.R.C.P. Rule 41(b). Such judgment can be found in Appendix A.

District Court,through its judgment ,neglected the fact that petitioner presented as evidence during trial that retaliation, contracts law, promissory estoppel, and

fraud have application in this case.
During trial the Court again expressed biased remarks toward petitioner that promissory estoppel is too difficult for him to understand it.

The Court reasoned that petitioner as long as did not sell his house in Davenport, during his employment for respondents, no loss has been incurred. The Court thru such judgment neglected the fact that respondent-Ashland offered only 60% of cost price for petitoner's house, and not the entire cost price as promised.

The Court also failed to consider that petitioner resigned from his previous job based only on respondent- Ashland's promises for his relocation, they didn't keep them, and petitioner still has his house but without job and pension benefits at the age of 60 years old. It was not posible to find another job since my employment has been terminated on 3/22/1989.

An appeal has been filed timely, in the Sixth Circuit Court of Appeals which affirmed on 3/19/1991, District Court's judgment pursuant to Rule 9(b)(5) of the Circuit Court of Appeals. The opinion can be found in Appendix B. A petition for rehearing has been filed on time in the same Circuit Court of Appeals, which also has been denied on May 10,1991. The opinion can be found in Appendix C.

The opinion of the Circuit Court of Appeals is nothing more than a rubber stamp of District Court judgment. Such approach is very expedient and doesn't take too much effort.All claims presented by the petitioner for review,and the unjustice committed to him,were not considered at all.It is very regretable that people willing to do a good and creative work in their life are discouraged when their work is quoted in this manner and some courts accept such treatment like in petitioner's case.

REASONS FOR GRANTING THE WRIT

The decision of the Sixth Circuit Court of Appeals conflicts with the decision of other courts, its own decisions, and with petitioner's constitutional rights.

District Court did allow petitioner to amend the complaint without any condition that a timely demand for jury trial be stricken from the amended complaint.

Circumstances must be exceptional before party is required to forego his constitutional right to trial by jury. Local 783 AFL-CIO v.General Electric Co.,471 F.2d 751,38 L.Ed.2d 55.

District Court denied petitioner's demand for jury trial based only on the fact that jury trial has not been requested in the original complaint. Petitioner amended the complaint adding respondent- Ashland which initially refused to provide any documents for discovery,and district court denied petitioner's motion to compel for a complete discovery. In this situation only a trial by jury could have had questioned

the abuse of discretion of district court.

Dispositive criteria in determining the right to jury trial is presence or absence of action at law; if any of claims at issue are legal rather than equitable, than right for jury trial cannot be infringed. U.S.C.A. Const. Amend. 7. Baker v. Amoco Oil Co., 751 F.Supp.1357.

Seeking damages and permanent injunctive relief is legal issue for purpose of 7th Amendment jury trial right. U.S.C.A. Const. Amend.7; 42 U.S.C.A. Section1983; Perez Serrano v. De Leon Velez 868 F.2d 30.

Jury trial must arise out of Seventh Amendment, U.S.C.A. Const.Amend, F.R.C.P. Rule 38(a), and 28 U.S.C.A. Section 1254.
Discharged employee was entitled to a jury trial on claim for relief under 42 U.S.C.A. Section 1981, 748 F.Supp.280.

The remedy for abuse of discretion by court by ruling on question whether evidence is sufficient to jury is by correction on appelate review. Galloway v.U.S., 63 S.Ct. 1077, 319 U.S. 372, 87 L.Ed.1458; Buesher v. Auto Lite Battery Corp. 11 F.R.D.514.

Even in cases of late filing, district court has a broad discretion in ruling on Rule 39(b) motion, and such discretion should be exercised in favor of granting jury trial in the absence of strong compelling reasons to the contrary. Misco Inc. v. U.S. Steel Corp. 784 F.2d 198,205 (6th Cir.1986).

Petitoner was hired by respondent-Ashland under certain written and verbal promises made by its representatives, which reasonably expected and proved by facts to generate action or forbearance of a definite and substantial character on the part of promisee who is the petitioner in this case.

Petitioner based on such promises resigned from his job having left only seven years before retirement. The injustice can be avoided only by enforcement of the promises made by respondent-Ashland.

Equitable estoppel principles are applicable to actions arising under federal law. Estoppel is the process to stop somebody to deny the truth of his statement. Wright v. Farmers' National Corp., 74 F.2d 425.

Estoppel is a means to prevent injustice. Universal Computer Systems Inc.v. Medical Services Association of Pennsylvania 628 F.2d 820,31 U.S.C.A. Section 9307.

Promissory estoppel has been expanded in use beyond the contract laws, to protect against retaliations. McClatchy Newspaper v. Superior Ct., 209 Cal.Rptr.598(1985).

A case, similar to petitioner's case set out by the Ohio Supreme Court where promissory estoppel has application is Mers v. v. Dispatch Printing Co.,483 N.E.2d 150. The doctrine of promissory estoppel is applicable and binding to oral employment at

will agreements when a promise which the employer reasonably expects to induce action or forbearance, if injustice can be avoided only by the enforcement of the promise.

Verbal and written promises made by respondent-Ashland to petitoner during his interviews when an offer for employment has been made, should also be considered as a contract.

A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. Restatement Second of Contract (1981) Section 90; Green v.Institute Unit Mgmt.,748 F.2d 827.

In petitoner's case respondent-Degussa committed a breach in employment contract, even under asumption of arguendo that was at will employment, by terminating the employment of petitioner through retaliation two days after the petitioner wrote a letter on 3/20/1989 showing his unsatisfaction about relocation and unjust demotion. Marshal v.TRW Inc., Rada Pump Division 900 F.2d 1517.

Wrongful discharge of at will employee

thru retaliation is the time of the past. During late 70's and early 80's, at will doctrine of private employment came under intense assault in all sections of society of this country.American Jurisprudence vol. 31 p.518.

Asuming arguendo that petitoner has had an employment at will with respondents. As long as respondent-Ashland made representations altering terms of employment at will such as: "that petitoner could work for respondent-Ashland even after retirement if he wishes" such employment at will becomes an employment under a verbal contract. Such promise has not been changed when petitioner became respondent-Degussa's employee because representatives were the same as for respondent-Ashland and they didn't inform petitioner otherwise.In such case the existence of an employment contract has been established for the period of time till petitioner's retirement. Respondents breached the contract without cause, establishing in such situation a prima facia case.

The status of frauds has also application in this case. Petitioner was assured by respondent-Ashland's representatives,who later on became respondent's-Degussa's representatives,that petitioner's title will be Director of R&D,and through relocation should not loose money through sales of his house.These assurances were not fulfilled.

Respondent has made material representation that was false,that knew was false or made recklessly without knowledge of its truth that he made with intent that it should be acted by petitioner, that petitioner acted on reliance thereon,and thereby suffered injury.Bilkowski v.Merril Lynch Inc.,866 F.2d 821; Ott v.Midland Ross Corp. 600 F.2d 24.

Award is supported when fraud is established by evidence that is clear,direct,precise and convincing. Roman Ceramics Corp., Peoples Nat'l Bank, 714 F.2d 1207,1214.

Fraud occurs where defendant makes false statements of material fact,defendant knows that statement is false,defendant intends that plaintiff will rely on it, plaintiff's reliance is justified,and plaintiff therefore sustains damage.Good v.Zenith Electronics Corp., 751 F.Supp.1320.

Petitioner's promotion has been denied by respondents because he asked his rights

concerning his relocation and wanted to perform his job in an effective way, by asking people reporting to him, in a very polite fashion,to achieve their goals and objectives. Some of them did not like the approach,being used to take it easy,and started all types of complaints or even insulting petitioner. For such continuous efforts from petitioner,he was not encouraged but demoted,and later on his employment terminated,in spite of fact that short time before,his supervisor quoted his work as "very effective".

Promotion decision may be actionable under 42 U.S.C.A. Section1981, 29 U.S.C.A. Section 158 Note 704.

Termination of petitioner employment by respondent-Degussa's representatives, who previously were respondent-Ashland's representatives was an act of conspiracy.

Civil Conspiracy is not actionable in and of itself; its purpose is to serve as a

device through which vicarious liability in underlying wrong may be imposed upon all who are part of it. Riddel v. Ridell Washington Corp.,866 F.2d 1480.

Action for conspiracy may be construed under 14th Amendment-due process clause, and 42 U.S.C.A. Section1983. Slavin v. Curry,583 F.2d 779, 574 F.2d 1256, 102 L. Ed.2d 469.

Cause of action based upon conspiracy may be posited either upon 42 U.S.C.A. Section 1981 or 1983.Mizell v. North Broward Hospital Dist.,427 F.2d 468.

Conspiracy may be basis for claim under 42 U.S.C.A. Section1983. Sowell v. Israel, D.C.Wis.1980, 500 F.Supp.209.

Refusal of trial court to grant subpoena to key employees working for respondents, in order to produce answers to interrogatories requested by petitioner for a complete discovery, constitutes an infringement of constitutional rights of petitioner under 14th Amendment. Supreme Court in such cases remanded for further proceedings as due process clause under 14th Amendment. 94 L.Ed.2d 40.

In various occasions respondents proposed a settlement between $2500to $5000 demonstrate also an evidence of bad faith from respondents' side. In spite of fact that petitoner would incure losses over $ 500,000, was willing to settle and reach a compromise. White v. Western Title Ins. 710 P. 2d 309.

This petition for writ of certiorari prepared by the petitioner pro se,who doesn't have training in law,may have some flaws but has meritorious claims under 42 U.S.C. A. Section 183,should be considered because they have prima facia merit to warrant the expense of a trial. Palmigrano v. Mullen 491 F.2d 978.

Questions which are not mentioned in petition for certiorari to Supreme Court are not properly before Court for consideration: however this rule does not limit the power of Supreme Court to decide important questions not raised by parties. National Ass'n of Broadcasters v.F.C.C.,(1976),554 F.2d 1118,180 U.S.App.D.C.259.

While ordinarily, Supreme Court does not

take note of errors not called to attention of Court Of Appeals nor properly raised in Supreme Court, that rule is not without exception and Court has power to notice plain error though it is not assigned nor specified. Silber v. U.S., App.D.C., 82 S.Ct. 1987, 370 U.S. 717, 8 L.Ed 2d 798.

The Supreme Court may on its own motion notice errors to which no exception has been taken if they seriously would affect the fairness, integrity, or public reputation of judicial preceedings. Johnson v. U.S., 63 S.Ct. 549, 318 U.S. 189, 87 L.Ed. 1164.

Finally the corrections of the Sixth Circuit Court's decision is open to serious questions. The refusal of the Sixth Circuit to consider those facts and findings, and the action of the Court in reviewing the record de novo and in making its own findings cannot be justified.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgement and opinion of the Sixth Circuit.

Respectfully submitted,

John Burche petitioner pro se

John Burche

CERTIFICATE OF SERVICE

I, JOHN BURCHE petitoner pro se hereby certify that pursuant to Rule 33 of the Supreme Court, I served three copies of the foregoing Petition for Writ of Certiorari as follows:

DEGUSSA CARBON BLACK CORP., respondent, by regular U.S. Mail to Mr. EDWARD KATZE at CONSTANGY, BROOKS & SMITH, 2400 Peachtree Center Building, 230 Peachtree St.N.W. Atlanta GA. 30303.

ASHLAND CHEMICAL CO., respondent, by regular U.S.Mail to Mr. THOMAS W.HILL at EMENS, HURD, KEGLER & RITTER, 65 East State St. Suite 1800, Columbus OH.43215.

All parties required to be served have been served.

Dated July 25th 1991

JOHN BURCHE JBurche

5210 Division St. Davenport Iowa 52806

Phone 319 386 4736

A P P E N D I C E S

APPENDIX " A"

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OHIO

EASTERN DIVISION

John Burche,	CASE NO.
Plaintiff,	5:89 CV 981
vs.	JUDGMENT ENTRY
Ashland Chemical Co.,	
Defendant.	

This case came on for trial on June 18, 1990. At the end of the plaintiff's case, the defendant Ashland Chemical Co., moved for dismissal pursuant to the provisions of Rule 41(b) of the Federal Rules of Civil Procedure.

The Court dictated its findings of fact into the record and then announced its conclusions of law and granted the defendant's motion.

WHEREFORE IT IS HEREBY ORDERED, ADJUDGED and DECREED that judgment is granted in

favor of defendant Ashland Chemical Co., and against plaintiff. Each party to bear its own costs.

/s/ David D.Dowd,Jr.

U.s.District Judge

B1

NO. 90-3641

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

John Burche,

Plaintiff-Appellant,

v.

Ashland Chemical Co.,

Degussa Carbon Black Co.,

Defendants-Appellees.

Filed

March 19,1991

Leonard Green

Clerk

ORDER

BEFORE: MARTIN and MILBURN , Circuit judges, and ENGEL Senior Circuit judge.

John Burche,a pro se Iowa resident,appeals the district court's dismissal of his amended civil complaint for breach of contract and wrongful discharge. The case has been referred to a panel of the court pursuant to Rule 9(a), Rules of Sixth Circuit. Upon examination of the briefs and the record, this panel unanimously agrees that oral argument is not needed.Fed.R.App.P.34(a).

In March 1988,Burche was hired as a research

manager for Ashland's carbon black division in Akron,Ohio. In November 1988,Ashland sold its carbon black division to defendant Degussa. Burche accepted an offer for employment from Degussa,but he was ultimately terminated from that position on March 22,1989.

Seeking monetary relief, Burche filed suit alleging that Ashland did not honor its oral promise to pay the difference between the market price of his Iowa home and the costs he expended in acquiring the home, and that Degussa wrongfully terminated his employment.

Both defendants filed motions for summary judgment and Burche responded. The district court granted summary judgment for Degussa, finding that Burche was an employee at will and that there was not evidence that Degussa ever ratified or assumed the alleged oral promises made to Burche by Ashland.

However,the district court denied Ashland's motion for summary judgment and set the case for trial to determine whether or not Burche was entitled to compensatory damages under a theory of promissory estoppel.A bench trial was ultimately held,during which the court granted Ashland's motion for an involuntary dismissal under Fed.R.Civ.P. 41(b) after the close of Burche's evidence.
The court also issued findings of fact and conclusions of law pursuant to Rule 52(a). Specifically,the court found that Burche had not made out a claim of promissory estoppel because he was not injured by reliance on Ashland's alleged promise.The court reasoned that Burche had not sold the house in Iowa,and therefore did not incure any loss.The court also found that it was not foreseeable that Ashland would sell its carbon black division to another company and that that company would terminate

Burche.

On appeal,Burche reasserts his claims and additionally argues that the district court improperly limited his discovery; that he was improperly denied a jury trial;and that the trial judge was biased against him. Upon review,we affirm the district court's summary judgment dismissal of Degussa for the reasons stated in the court's opinion dated March 6,1990. We also conclude that the district court properly granted Ashland's motion for an involuntary dismissal under Fed.R.Civ.P. 41(b).The court's findings of facts are not clearly erroneous and they support the court's conclusion that Burche had not made out a claim for promissory estoppel. Anderson v. City of Bessemer City,470U.S. 564,573 (1985); Haskell v. Washington Township, 864 F.2d 1266,1274 (6th Cir.1988). The district court also did not abuse its discretion in limiting Burche's discovery request because the only relocation information pertinent to Burche's case was that information pertaining to newly hired employees. See Chrysler Corp. v.Fedders Corp.,

643 F.2d 1229,1240 (6th Cir.1980), cert. denied,454 U.S.893 (1981). The district court also properly denied Burche's request for a jury trial because he did not make a timely jury demand in his complaint or within ten days after defendants filed their answer. See Fed.R.Civ.P.38(b). Nor did the amended complaint contain any new issues which could have revived Burche's right for a jury trial.See Irvin v. Airco Carbide Inc., 837 F.2d 724,727 (6th Cir. 1987).Finally,the district court was not biased against Burche because he was proceeding pro se. To the contrary,the court patiently explained what rules and procedures Burche needed to follow in order to fully litigate his case.

Accordinly,the district court judgment is hereby affirmed pursuant to Rule 9(b(5),Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT /s/L.Green
Clerk

C1

NO. 90-3641

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

JOHN BURCHE,

Plaintiff-Appellant,

v.

ASHLAND CHEMICAL CO. ;

DEGUSSA CARBON BLACK COMPANY

Defendants-Appellees

FILED

May 10,1991

Leonard Green

Clerk

ORDER

BEFORE: MARTIN and MILBURN, Circuit judges; and ENGEL,Senior Circuit judge.

The court having received a petition for rehearing en banc,and the petition having been circulated not only to the panel members but also to all other active judges of this court,and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY THE ORDER OF THE COURT

/s/ Leonard Green, Clerk

Supreme Court, U.S.
FILED
AUG 2 8 1991
OFFICE OF THE CLERK

No. 91-175

In The

Supreme Court of the United States

October Term 1991

JOHN BURCHE,

Petitioner,

v.

DEGUSSA CARBON BLACK CORP. and ASHLAND CHEMICAL CO.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

EDWARD KATZE*
ROSEMARY C. LUMPKINS
Counsel of Record for Respondent Degussa Carbon Black Corp.
CONSTANGY, BROOKS & SMITH
230 Peachtree Street, N.W.
Suite 2400
Atlanta, Georgia 30303
(404) 525-8622

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether the Sixth Circuit and the district court correctly determined that, under Ohio law, Respondent Degussa was entitled to summary judgment because the undisputed material facts established 1) Petitioner was an employee-at-will of Degussa; and 2) Degussa had neither assumed nor ratified through a novation the oral promises Petitioner alleged were made to him by Respondent Ashland.

2. Whether the Sixth Circuit correctly determined that the district court did not abuse its discretion in 1) denying Petitioner's untimely jury demand; and 2) limiting and/or denying certain of Petitioner's discovery requests.

3. Whether the Sixth Circuit correctly determined that the district court was not in any way biased against the Petitioner.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 9

REASONS FOR NOT GRANTING THE WRIT 11

I. The district court and the Sixth Circuit applied the correct standard of review to Degussa's Motion for Summary Judgment, and correctly determined that, under Ohio law, the uncontroverted evidence established that Petitioner was an employee-at-will of Degussa, and Degussa had neither assumed nor ratified through novation the oral promises Petitioner alleged were made to him by Respondent Ashland 11

II. The Sixth Circuit correctly determined that the district court did not abuse its discretion in 1) limiting and/or denying certain of Petitioner's discovery requests; and 2) denying Petitioner's untimely jury demand 21

III. The Sixth Circuit reviewed the record in this case and correctly determined that the district court was not in any way biased against the Petitioner 27

CONCLUSION 28

TABLE OF AUTHORITIES

Page

CASES

Andrulonis v. U.S., 96 F.R.D. 43, 45 (N.D. N.Y. 1982) 24

Barham v. IBM Corporation, 78 F.R.D. 340, 341 (N.D. Ohio 1978) 22, 23

Bolling v. Clevepak Corp., 20 Ohio App.3d 113, 484 N.E.2d 1367 (1984) 16, 17

Brockett v. Spokane Arcades, Inc., 472 U.S. 491 (1985) 9

Burche v. Ashland Chemical Company, 928 F.2d 404 (6th Cir. 1991), 1991 LEXIS 4707 8-9

Citizens State Bank v. Richart, 16 Ohio App.3d 445, 476 N.E.2d 383, 385 (1984) 17

Colonial Times, Inc. v. Gasch, 509 F.2d 517 (D.C. Cir. 1975) 22

Holland v. Minneapolis-Honeywell Regulator Co., 28 F.R.D. 595 (D.D.C. 1961) 24, 25

Holt v. Southern Railway Co., 51 F.R.D. 296, 299-300 (E.D. Tenn. 1969) 24

International Ass'n of Machinists, Dist. 169 v. Amana Refrigeration, Inc., 90 F.R.D. 1, 1-2 (E.D. Tenn. 1978) 24

Irvin v. Airco Carbide, Inc., 837 F.2d 724, 726 (6th Cir. 1988) 27

Kitchen v. Chippewa Valley Schools, 825 F.2d 1004, 1013 (6th Cir. 1987) 25

Livernois v. Warner-Lambert, 723 F.2d 1148 (4th Cir. 1983) 16

TABLE OF AUTHORITIES – Continued

Page

Lucas v. Curran, 62 F.R.D. 336, 337 (E.D. Pa. 1974) 22

Meredith v. Rockwell International Corporation, 826 F.2d 463 (6th Cir. 1987) 14, 16, 19, 20

Parson v. Denny's Restaurants, Ohio App.3d ___, ___ N.E.2d ___, 1988 Ohio App. LEXIS 5109 (M.S. December 9, 1988) 13

Phung v. Waste Management, Inc., 23 Ohio St.3d 100, 491 N.E.2d 1114 (Ohio S. Ct. 1986) 12

Regents of University of Michigan v. Ewing, 474 U.S. 214, 224 (1985) 9

Virginia v. American Booksellers Assn., 484 U.S. 383, 395 (1988) 9

Wirtz v. I. C. Harris & Co., 36 F.R.D. 116, 117 (E.D. Mich. 1964) 24

TREATISES

10 *Fed. Proc., L. Ed.*, 26:293 at 532 25

10 *Fed. Proc., L. Ed.*, 26:320 at 559 24

4A J. Moore, *Moore's Federal Practice*, ¶33.06 at 30-33 (2d ed. 1991) 24

4A J. Moore, *Moore's Federal Practice*, ¶33.07 at 33-39 (2d ed. 1991) 24

RULES

Federal Rules of Civil Procedure, Rule 19 15

Federal Rules of Civil Procedure, Rule 30(b)(4) ...22, 23

TABLE OF AUTHORITIES – Continued

Page

Federal Rules of Civil Procedure, Rule 33(a) 24

Federal Rules of Civil Procedure, Rule 38(b) 25

Federal Rules of Civil Procedure, Rule 39(b) 25, 26

No. 91-175

In The

Supreme Court of the United States

October Term 1991

JOHN BURCHE,

Petitioner,

v.

DEGUSSA CARBON BLACK CORP. and ASHLAND CHEMICAL CO.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

By letter dated January 29, 1988, Art Smucker of Management Recruiters of Akron, Ohio, acting on behalf of Petitioner provided Respondent Ashland Chemical Co. ("Ashland") with a copy of Petitioner's resume, offering Petitioner as a "candidate for [Ashland's] manager of carbon black research." Thereafter, Petitioner had two personal interviews with Ashland. The first interview took place on February 16, 1988. At the beginning of that interview, Petitioner completed and signed an application

for employment. This application contained an Acknowledgements section, wherein, by his signature thereunder, Petitioner acknowledged, among other things, as follows:

> In consideration of my employment and/or my being considered for employment by the [Ashland], I . . . acknowledge that my employment may be terminated, and any offer of such to occur, may be withdrawn and *with or without cause and with or without prior notice at any time at the option of [Ashland] or myself. I understand that no representative of [Ashland] other than a vice-president or a higher level officer of the company, by acknowledgement in writing, has any authority to enter into any agreement for employment for any specified period of time or to assure any other personnel action, either prior to commencement of employment or after I have become employed, or make any agreement contrary to the foregoing.*

(Emphasis added).

During Petitioner's second interview on March 4, 1988, Ashland extended an oral offer of employment to Petitioner which he accepted the same day.[1] Petitioner alleged that, prior to accepting Ashland's offer, *oral promises* were made to him during his interview by Grant Reed, then Ashland's Vice President and General Manager, to wit: (1) That pursuant to Ashland's relocation policy, he would not "lose money" on the sale of his Davenport, Iowa, residence; (2) that his position with Ashland would be that of "Director of R & D at [the]

---

[1] Petitioner admitted in his deposition that he understood that neither he nor Ashland were obligated or bound in any way to continue his employment for any definite period of time. (Petitioner's Dep., p. 225).

Akron Technical Center"; (3) that he would be given what would be needed in order to upgrade the technical capability of the Akron Technical Center, including, in addition to technicians, additional professional personnel, and additional equipment, specifically a pilot reactor to be used in the development of new carbon blacks; and (4) that he would benefit from Ashland's "very good retirement and profit sharing" benefit package.

By letter dated March 4, 1988, James Graham, who recruited professional personnel for Ashland, acknowledged Petitioner's acceptance of Ashland's oral offer of the position of "Research Manager" with Ashland's Carbon Black Division, noting that his employment was contingent upon, among other things, his execution of Ashland's Service Agreement, a copy of which was enclosed in Graham's letter. Petitioner executed the Service Agreement on March 8, 1988, and thereby agreed, among other things, that the

> AGREEMENT DOES NOT GUARANTEE CONTINUATION OF EMPLOYMENT FOR ANY PERIOD AFTER HIRE; THAT I RESERVE THE RIGHT TO TERMINATE MY EMPLOYMENT AT ANY TIME FOR ANY REASON; AND THAT ASHLAND RESERVES THE RIGHT TO TERMINATE MY EMPLOYMENT AT ANY TIME FOR ANY REASON.

(Emphasis by capitalization in original). By signing this Service Agreement, Petitioner further acknowledged that he had read and understood the Agreement, and agreed to be bound by its restrictions.

Also enclosed in the acknowledgement letter from Ashland was a copy of Ashland's written relocation policy

and a relocation assistance request form, which Petitioner was to complete and return if he wished Ashland's relocation assistance office to contact him. In due course, appraisal reports were prepared on Petitioner's Davenport, Iowa, residence. Petitioner began working for Ashland on March 20, 1988.

On October 19, 1988, Ashland issued a press release announcing that it would sell its carbon black division to Respondent Degussa Carbon Black Co. ("Degussa").[2] On that same day, Ashland informed all of its employees of the pending sale. In a "farewell" letter to Petitioner dated November 8, 1988, Ashland's president referred to the pending sale and informed Petitioner that Degussa would be extending him an offer of employment at a salary at least equal to what he was then receiving from Ashland, as well as allowing him prior service credit for purposes of eligibility and vesting under Degussa benefit plans. Ashland's president further informed Petitioner that if he (Petitioner) rejected Degussa's offer of employment, Ashland would not be able to offer him ongoing employment, nor would Petitioner thereby be entitled to severance benefit in accordance with Ashland's standard policies. Petitioner admitted in his deposition that he understood from this letter that his employment with Ashland would be terminated, and that he would be hired by Degussa.

By letter dated November 18, 1989, Degussa offered Petitioner the position of Senior Research Chemist II, set

---

[2] Degussa Carbon Black Co. is a subsidiary of Degussa AG, which is publicly traded on the Frankfurt, Germany Exchange. Degussa does not have any non-wholly owned subsidiaries.

forth his starting salary, and advised him to whom he would report. Petitioner understood that the offer by Degussa was to a lesser position than the one he had held with Ashland, but that his salary would, nevertheless, remain the same. The letter further stated that Petitioner's employment with Degussa would be (1) contingent upon the final closing of the asset sale agreement between Ashland and Degussa, and (2) governed by Degussa's regulations, plans, and policies, as may be amended from time to time. NO OTHER TERMS, PROVISIONS, PROMISES, OR REPRESENTATIONS WERE MADE WITH RESPECT TO PETITIONER'S EMPLOYMENT BY DEGUSSA. The letter also requested that, should Petitioner accept the position offered, he indicate his "agreement with the conditions described" in the letter by signing the letter where provided and returning it to Degussa within a week after receipt thereof. Petitioner signed the letter on November 23, 1988, reflecting that he had read and accepted the terms and conditions of employment with Degussa as set forth therein.

Prior to receiving and signing the above described letter, Petitioner had no discussions whatsoever with anyone from either Ashland or Degussa regarding his employment by Degussa, other than a brief conversation with John Hugg, during which Hugg informed Petitioner that his offer of employment by Degussa would probably involve a demotion from his position with Ashland. More importantly, neither prior to, nor at the time of, Petitioner's acceptance of Degussa's offer, did he discuss with anyone at Degussa the oral promises he alleges

were made to him when he was hired by Ashland.[3] Furthermore, the November 8, 1988, letter, offering Petitioner the position with Degussa, and a subsequent written announcement of his acceptance, were the only writings evidencing Petitioner's employment with Degussa, which was strictly at-will for an indefinite term. Indeed, Petitioner admitted in his deposition that he did not obligate himself to work for Degussa for any definite period of time, nor did Degussa obligate itself to employ him for any definite period of time.

The Agreement of Purchase and Sale of Assets made by and between Ashland and Degussa (hereinafter "Agreement") provided that Degussa would not assume "any liabilities or obligations attributable to or arising from or having origin in any employer-employee relationship with [Ashland], its affiliated companies, or the Carbon Black Division existing at any time prior to the effective closing date except those matters specifically assumed by [Degussa] pursuant to Section 3.2 and Section 3.1 (iv) and (vi)."[4] Section 6 of the Agreement consists of the Representations and Warranties of Ashland, and subsection 6.18 of Section 6 specifically pertains to employee contracts and benefits, and provides that "Schedule 6.18 attached hereto contains a list of *all*

---

[3] The first time Petitioner ever informed anyone at Degussa of the alleged "unfulfilled promises" was by way of a letter to A. A. McNeish, dated March 20, 1989, two days prior to his termination.

[4] The matters assumed by Degussa as set forth in Sections 3.2 and 3.1 (iv) and (vi) have no relationship whatsoever to the kind of claim asserted by Petitioner.

employment contracts and collective bargaining agreements, *and all* pension, bonus, profit sharing, deferred compensation, retainer, consulting, incentive, welfare, "fringe benefits," stock option, or *other agreements or arrangements, written, oral, or customary, qualified, or unqualified, providing for [Ashland's] employee remuneration or benefits to which [Ashland] is a party or by which it is bound as applying to employees* who are listed in Schedule 6.17 generally." (Emphasis added). Schedule 6.18, referred to in subsection 6.18 above, specifically states that "other than the union contracts listed in this schedule, *Ashland has no employment related contracts except for those listed in Schedule 6.13.*" (Emphasis added). And, under paragraph 11A(i) of Section 6.13, it is provided that "*there are no employment contracts*" other than the ones listed in Schedule 6.18. (Emphasis added).

Thus, under the terms of the Agreement, Degussa assumed no liabilities with respect to any employment related contracts, nor did Ashland disclose the existence of any such contracts. The only agreement by Degussa with respect to the employees it hired from Ashland is contained in Section 13.5 of the Agreement, and this Section merely sets forth Degussa's agreement to hire certain employees at comparable salaries and to provide said employees with service credit, etc., toward their pension and other employee fringe benefit plans.

As a part of its plan to hire certain of Ashland's employees, Degussa offered Bonnie Stuck, who had been hired by Ashland as a Research Chemist I to work under Petitioner's supervision, the position of Acting Research Manger at Degussa (Petitioner's previous position at Ashland), which position she accepted. Ms. Stuck thereby

became Petitioner's supervisor at Degussa. Ms. Stuck later resigned from Degussa because of her difficulties with Petitioner. Petitioner was terminated by Degussa on March 22, 1989.

On May 25, 1989, Petitioner filed his complaint against Degussa in the U.S. District Court for the Northern District of Ohio, Eastern Division, alleging breach of oral promises he claims Ashland made to him, and that liability therefore was "transferred" to Degussa when Degussa purchased Ashland's carbon black division and hired him. He further alleged that Degussa terminated him in retaliation because he "reminded" Degussa about those alleged oral promises by Ashland. On September 1, 1989, Petitioner was granted leave to file an Amended Complaint naming Ashland as an additional defendant. Petitioner's Amended Complaint is identical to his original Complaint except for the addition of Ashland as a party defendant.

On March 6, 1990, the district court granted Degussa's Motion for Summary Judgment concluding that Petitioner was an employee-at-will and therefore subject to discharge at any time. The district court further determined there was no evidence that Degussa had either assumed or ratified through novation the alleged oral promises by Ashland. (See District Court's Memorandum Opinion and Judgment Entry attached as Appendix A).

The Sixth Circuit affirmed the district court's grant of summary judgment in favor of Degussa for the reasons set forth in the March 6, 1990, decision of the district court. (Reported as Table Case at 928 F.2d 404 (6th Cir.

1991).) (See opinion of Sixth Circuit attached as Appendix B).

SUMMARY OF ARGUMENT

Respondent Degussa respectfully submits (1) that this case does not raise a federal question warranting review by this Court; (2) that the decision of the Sixth Circuit is not in conflict with any decision of this Court, with any decision of another United States Court of Appeals, or with any decision by the Ohio appellate courts with respect to issues governed by Ohio law. Further, an inquiry into the merits of the issues Petitioner attempts to raise reveals that the substantive law issues were correctly decided, and that there was no abuse of discretion with respect to the procedural issues raised.

As stated in *Regents of University of Michigan v. Ewing*, 474 U.S. 214, 224, n. 10 (1985), this Court generally accords great deference to the lower federal courts' determinations of state law: "In dealing with issues of state law that enter into judgment of federal courts, we [the Supreme Court] are hesitant to overrule decisions by federal courts skilled in the law of particular states unless their conclusions are shown to be unreasonable." *Accord, Virginia v. American Booksellers Assn.*, 484 U.S. 383, 395 (1988) ("This Court rarely reviews a construction of state law agreed upon by two lower federal courts," citing to *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491 (1985)). Except for Petitioner's procedural issues, all of his claims are grounded in Ohio law, which both the district court

and the Sixth Circuit correctly applied in their decisions in favor of both respondents.

In his appeal to the Sixth Circuit, Petitioner contended that oral promises were made to him by Ashland and that liability for the unfulfillment thereof somehow "transferred" to Degussa. Degussa submits, however, that the particular oral promises Petitioner alleges did not relate to his duration of employment, nor did they in any way purport to limit the reasons he could be terminated. Therefore, notwithstanding the alleged oral promises, Ashland and Degussa had the right to terminate Petitioner for any reason or no reason, since as established by Petitioner's deposition testimony, his employment by Ashland, and later by Degussa, was not for any definite term, and, therefore, he was at all times an employee-at-will.

Moreover, the promises alleged by Petitioner do not give rise to a promissory estoppel claim because the oral representations alleged were not "promises" at all. Nor did Ashland expect Petitioner to have reasonably relied on the alleged "promises" not only because of their character, as testified to by Petitioner, but also because, before the alleged oral "promises" were made, Petitioner had already acknowledged in writing that his employment was at-will, and that no one at Ashland had the authority at any time during his employment to *orally* "assure any benefits or terms and conditions of employment." Neither in opposition to Degussa's Motion for Summary Judgment nor on appeal to the Sixth Circuit did Petitioner point to even a scintilla of evidence to the contrary.

Even assuming *arguendo* that an issue of fact existed with respect to whether the alleged oral promises amounted to enforceable contracts, no liability for any breach thereof was transferred to Degussa by a novation. Degussa's agreement with Ashland expressly provided that any liability or obligations arising out of "agreements or arrangements, written, oral or customary, qualified, or unqualified, providing for [Ashland's] employee remuneration or benefits" would be retained by Ashland. Furthermore, neither Ashland nor Petitioner ever disclosed to Degussa the existence of the alleged promises either prior to, or at the time of, Degussa's purchase of Ashland's carbon black division and its employment of Petitioner.

Finally, the Sixth Circuit correctly determined that the district court did not abuse its discretion in denying Petitioner's belated request for a jury trial or by resolving several discovery disputes against him. If anything, the district court "bent over backwards" to insure that Petitioner had his "say."

REASONS FOR NOT GRANTING THE WRIT

I. THE DISTRICT COURT AND THE SIXTH CIRCUIT APPLIED THE CORRECT STANDARD OF REVIEW TO DEGUSSA'S MOTION FOR SUMMARY JUDGMENT, AND CORRECTLY DETERMINED THAT, UNDER OHIO LAW, THE UNCONTROVERTED EVIDENCE ESTABLISHED THAT PETITIONER WAS AN EMPLOYEE-AT-WILL OF DEGUSSA, AND DEGUSSA HAD NEITHER ASSUMED NOR RATIFIED THROUGH NOVATION THE ORAL PROMISES PETITIONER ALLEGED WERE MADE TO HIM BY RESPONDENT ASHLAND.

It is unquestionable that the district court applied the correct standard of review in ruling on Degussa's Motion

for Summary Judgment. That standard is set forth in precise detail as Part II of the District Court's Memorandum Opinion (See. pp. 2-4, Appendix A).

The rule in Ohio continues to be that an employee who is hired for an indefinite term is an employee-at-will and may be discharged at any time, for *any* reason or no reason, with or without cause. *Phung v. Waste Management, Inc.*, 23 Ohio St.3d 100, 491 N.E.2d 1114 (Ohio S. Ct. 1986). As Petitioner admitted in his deposition at pages 326-327 and 330, he was hired by Degussa for an indefinite period, and therefore, the district court correctly concluded that Petitioner was an employee-at-will with Degussa, and could be terminated at any time with or without cause.

Relying on a theory of equitable estoppel, Petitioner asserted that oral promises were made to him by Ashland at the time Ashland offered him employment, and that he relied to his detriment on these promises. The acknowledgement made by Petitioner, however, in his application for employment with Ashland, which bears repeating below, was made *prior to the oral promises* he alleges Ashland made, and, as the district court noted, this undisputed fact precludes as reasonable any reliance by Petitioner on the oral promises he alleges were made:

> I further acknowledge that my employment may be terminated, and any offer of employment or my acceptance of any employment offer, if such is to occur, may be withdrawn *with or without cause and with or without prior notice at any time at the option of the company or myself. I understand that no representative of the company other than a*

> *vice-president or a higher level officer of the company, by acknowledgment in writing, has any authority to enter into any agreement for employment for any specified period of time or to assure any other personnel action, either prior to commencement of employment or after I have become employed, or to assure any benefits or terms and conditions of employment, or make any agreement contrary to the foregoing.*

(Emphasis added). *See, e.g., Parson v. Denny's Restaurants*, ___ Ohio App.3d ___, ___ N.E.2d ___, 1988 Ohio App. LEXIS 5109 (M.S. December 9, 1988, where the Court held as follows:

> [U]pon the facts and circumstances of this case, *including the disclaimer provisions in two separate documents, understood and acknowledged by appellant,* his own practice as employer's agent in hiring and firing, his own rationale for discharge and filing the lawsuit, *the ambiguity of the alleged presentations,* all conspire to demonstrate that there was no clear [un]ambiguous promise, no demonstration of reasonable reliance, and no reasonable expectation on the part of the employer of induced action and forbearance.

(Emphasis added).

Even assuming *arguendo,* however, that the oral representations alleged by Petitioner to have been made by Ashland presented a fact question as to Petitioner's reliance thereon, the district court and the Sixth Circuit correctly determined that there was no evidence whatsoever to support Petitioner's claim *against Degussa.* Based on the allegations in Petitioner's complaint, to the

effect that responsibility for the oral promises was somehow "transferred" to Degussa, and his deposition testimony with respect to his theory of Degussa's liability (Petitioner's Dep., pp. 375-377), Degussa observed that the legal basis for Petitioner's theory of recovery against Degussa is novation. Applying Ohio law to the undisputed facts of this case, the district court correctly concluded that Petitioner has no claim against Degussa under such a theory.

In *Meredith v. Rockwell International Corporation*, 826 F.2d 463 (6th Cir. 1987), a panel of the Sixth Circuit applied Ohio's law of novation to facts substantially similar to those in the present case. The plaintiff in *Meredith* had been employed for more than twenty years by Rockwell Canada, a subsidiary or Rockwell International. The court in *Meredith* noted that it had previously determined that Rockwell Canada and Rockwell International are separate entities. 826 F.2d at 464, fn. 1. Shortly, after leaving Rockwell Canada to work for a competitor, the plaintiff in *Meredith* was persuaded to return to Rockwell Canada by his friend, C. MacGregor Roberts, who was the plant manager of the Rockwell Canada's Chatham plant. The position Roberts offered to plaintiff was that of manufacturing manager at the Chatham bumper plant. The plaintiff claimed that his inducement to return to Rockwell Canada was Roberts' oral promise that Rockwell Canada would employ him [plaintiff] in some capacity until he retired. And, Roberts also testified that he told plaintiff that "he would have a job with Rockwell somewhere for the rest of his life." 826 F.2d at 467.

Over a year after plaintiff had assumed the position of manufacturing manager at the Chatham bumper plant,

that plant closed, and the plaintiff was offered the position of plant manager at a Rockwell International bumper plant in Newton Falls. *When the plaintiff accepted this position, he ceased being an employee of Rockwell Canada and became an employee of Rockwell International, which was the operator of the Newton Falls facility.* The next year, plaintiff was removed from his position as plant manager at the Newton Falls plant, which was closed sometime after his removal.

Over five years later, the plaintiff filed an action against Rockwell International claiming that it had breached the oral agreement made by Roberts that Rockwell would employ him until his retirement. The plaintiff's complaint was initially dismissed due to his failure to join Rockwell Canada as an indispensable party under Rule 19 of the Federal Rules of Civil Procedure. On appeal, however, the Sixth Circuit reversed and remanded, holding that the district court erred in failing to recognize plaintiff's alternative theory that there had been a novation, and that pursuant thereto, at the time of the alleged breach, Rockwell International, and only Rockwell International, was obligated to the plaintiff for breach of the alleged oral promise of employment until retirement. The case was remanded for trial on the issues of whether the plaintiff had an enforceable contract with Rockwell Canada; whether a novation of that contract occurred at the time of plaintiff's employment by Rockwell international; and whether Rockwell International breached that contract based upon the novation.

The jury returned a verdict for the plaintiff, and the defendant appealed from the judgment entered thereon. The Sixth Circuit reversed the judgment in favor of the

plaintiff, and held that the defendant Rockwell International was entitled to judgment notwithstanding the verdict on the issue of novation. In so holding, the Court reasoned as follows:[5]

> The law on novation in Ohio was recently summarized in *Bolling v. Clevepak Corp.*, 20 Ohio App.3d 113, 484 N.E.2d 1367 (1984), in which the Ohio court stated that for a novation to be effective "*all* the *parties* must agree to the substitution of the new debtor for the old one, and, therefore, to the new or changed terms pursuant to which the substitution is made. Intent, knowledge and consent are the essential elements in determining whether a purported novation has been accepted." *Id.* at 1379 (emphasis in original) (citations omitted). Concerning the evidence necessary to prove a novation the *Bolling* court held:
>
> > * * * [T]he evidence of [a party's] knowledge [of] and consent [to the terms of a novation] must be *clear and definite*, since a novation is never presumed. [citation omitted]. As the court of appeals observed in *Livernois v. Warner-Lambert*, [723 F.2d 1148 (4th Cir. 1983)], "one may not accomplish a novation *without negotiating a common understanding* with the other party or parties to an arrangement." (Emphasis added) *Id.* at 1153.
>
> 484 N.E.2d at 1379 (emphasis in original) (footnote omitted). The evidence of a novation, therefore may be implied, but under applicable Ohio

---

[5] Degussa quotes at length from the Sixth Circuit's opinion in *Meredith* because it is so closely analogous to the case at hand.

law clear and definite evidence must show mutual consent and a common understanding at the time of novation.

In this case, no evidence directly indicates that Rockwell consented at the time of transfer to employ Meredith until retirement. *Meredith testified that when he came to Rockwell he spoke to no one about the terms of his employment with Rockwell, and, specifically, that he never discussed with anyone at Rockwell the promise Mr. Roberts at Rockwell Canada had previously made to employ him until retirement.* Meredith's own testimony thus establishes that no "negotiation of a common understanding" about guaranteeing him employment until retirement ever took place when he was employed with Rockwell, a separate corporation from Rockwell Canada.

* * *

Testimony about [Rockwell International's] knowledge of the terms of Meredith's purported agreement with Rockwell Canada establishes nothing about Rockwell's agreement or acknowledgement of an obligation of employment until retirement when Meredith came to Rockwell's Ohio plant. *To establish a novation the evidence must show a common understanding and consent to the terms of the novation in 1974; a novation may not be presumed. See, Bolling,* 484 N.E.2D AT 1379; *Citizens State Bank v. Richart,* 16 Ohio App.3d 445, 476 N.E.2d 383, 385 (1984). * * * Meredith was dealing with two separate corporate employers. Although one was a subsidiary of the other, Rockwell Canada and Rockwell have been established as two separate and distinct corporate entities.

* * *

A novation is not to be presumed under Ohio law; neither can a key term of the employment contract claimed to constitute a novation be presumed. Meredith offers no clear and definite evidence that when Meredith came to Rockwell, the latter consented or agreed to employ him until retirement. No evidence shows that a Rockwell executive or representative made such an agreement in 1974.

* * *

Even assuming that the jury's verdict must have indicated a finding that Rockwell managers approved the rehiring of Meredith by Rockwell Canada in 1973, *there is no showing that Roberts had the authority or claimed to have the authority to bind Rockwell to such an arrangement. Roberts was acting for Rockwell Canada, and [it is] his oral agreement on behalf of Rockwell Canada which forms the basis for Meredith's claim.*

* * *

Assuming, as Meredith contends, that "Rockwell knew of the terms of Meredith's contract with Rockwell Canada," (Plaintiff's Brief at 7), there was still only an agreement in 1973 with Rockwell Canada, not Rockwell. Meredith testified that he believed that what Roberts told him "was approved" but "did not ask for anything in writing nor did he offer."

*The critical absence of proof, direct or circumstantial, relates to Rockwell's agreement in 1974 to assume Rockwell Canada's previous employment commitment with Meredith. * * * The court, and Meredith on appeal, pointed to no other evidence that relates to a 1974 new agreement or "substitution of a new contract" by Rockwell when Meredith transferred to the Ohio plant because of the Canada bumper plant's closing at that time.*

* * *

> Meredith said he "understood that everything that was agreed upon in Rockwell Canada was transferred with me to Rockwell U.S.," *but he conceded that no one discussed with him the "terms of employment" at Rockwell. He also conceded that no one at Rockwell Canada or Rockwell discussed with him in 1974 the "promises which you say that Mr. Roberts made to you in 1972," and that he spoke only to Roberts about working until retirement. * * * There was, therefore, no testimony that Rockwell in 1974 agreed to what other witnesses, without contradiction, stated was an "unheard of" employment arrangement, "lifetime" employment at Rockwell.*

(Emphasis added). (Footnotes omitted). 826 F.2d at 465-468.

Clearly, *Meredith* is "on all fours" with the present case. As in *Meredith*, there is no clear and definite evidence in this case, indeed *no evidence whatsoever*, that a novation occurred when Petitioner was terminated by Ashland and rehired by Degussa. Indeed, the evidence is to the contrary. Degussa's agreement of sale with Ashland *expressly* provided that Degussa would not assume any employee contracts or obligations of any kind, except those noted. Nor was the existence of any such "agreements" or "promises" as alleged by Petitioner disclosed to Degussa by Ashland.

In his deposition, Petitioner admitted, as did the plaintiff in *Meredith*, that when he assumed his position at Degussa, he never discussed with anyone at Degussa the promises he alleges were made to him when he began his employment with Ashland. Thus, Petitioner's own testimony establishes that there was no negotiation of a common understanding with anyone from Degussa about

guaranteeing him the things that he alleges were guaranteed to him by Ashland; nor is there any evidence whatsoever of a *common* understanding and consent to terms (oral promises of Ashland) of the alleged novation.

Furthermore, like the plaintiff in *Meredith*, Petitioner could not show that Grant Reed, while working for Ashland, had the authority to bind *Degussa* to the promises Petitioner alleged were made. In fact, as shown by the acknowledgment provision in the employment application executed by Petitioner, Reed did not have the authority to bind *Ashland* by making *oral* promises as alleged by Petitioner. Moreover, even assuming *arguendo* that by virtue of Degussa's hiring of Reed, Degussa could be held to have "known" about the alleged oral promises, as with Rockwell International in *Meredith*, this does not serve to thereby bind Degussa. "There was still only an agreement in [March of 1988] with [Ashland], not [Degussa]." 826 F.2d at 467. While Petitioner may have "believed that what [Reed] told him 'was approved' [by Degussa], . . . [he] 'did not ask for anything [orally or] in writing nor did he offer.' " *Id.* Thus, there is a complete absence of evidence that relates to a November 1988 "new agreement or 'substitution of a new contract' by [Degussa]" when Petitioner was hired by Degussa upon Degussa's purchase of Ashland's carbon black division. *Id.*

Based on the foregoing, there was no assumption by Degussa, express or implied of the promises alleged byPetitioner. Therefore, the district court and the Sixth

Circuit correctly determined that Degussa was entitled to summary judgment as to all of Petitioner's claims.[6]

II. THE SIXTH CIRCUIT CORRECTLY DETERMINED THAT THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN 1) LIMITING AND/OR DENYING CERTAIN OF PETITIONER'S DISCOVERY REQUESTS; AND 2) DENYING PETITIONER'S UNTIMELY JURY DEMAND.

A. Discovery.

In his appeal to the Sixth Circuit, Petitioner argued that the district court did not allow him to perform a "complete discovery." But, other than referring to the district court's ruling regarding his request to use a tape recorder to take down oral depositions, and the denial of his motions to compel, Petitioner did not specify why the court's discovery rulings were incorrect. Nevertheless, the record in this case will show that the district court simply required Petitioner, albeit in vain, to comply with the Federal Rules of Civil Procedure and the district court's local rules when taking discovery. In this regard, the district court, time and again, granted Petitioner leave to resubmit his discovery requests, but to no avail. Further, a review of Degussa's discovery responses plainly shows that Degussa, in an effort to prevent discovery

---

[6] Because under no theory or view of the facts can Degussa be held liable for the "oral promises" alleged by Petitioner, his cryptic claim that Degussa terminated him in retaliation for his complaining about the unfulfillment of these promises is a non sequitur.

disputes, provided Petitioner with virtually everything he requested.

As for Petitioner's request to tape record oral depositions, the district court's ruling was absolutely correct. Petitioner had moved the court pursuant to Rule 30(b)(4), Fed. R. Civ. P., for an order permitting the deposition testimony of certain named individuals to be recorded by audio tape-recording equipment. While Degussa did not question Petitioner's right to take depositions, Degussa opposed Petitioner's motion to tape record the depositions.

The clear purpose of Rule 30(b)(4) "is to facilitate the effective participation of the economically disadvantaged in the federal courts, through the lowering of costs as a result of the use of modern technology." *Lucas v. Curran*, 62 F.R.D. 336, 337 (E.D. Pa. 1974). In *Barham v. IBM Corporation*, 78 F.R.D. 340, 341 (N.D. Ohio 1978), the Court recognized that while "technological advances can and should inure to the benefit of those involved in litigation, . . . Rule 30(b)(4) . . . *makes it entirely discretionary with the trial judge whether to authorize the electronic recording of depositions.*" (Emphasis added.) Because of the difficulties attendant to achieving reliability and accuracy of the transcription of depositions testimony taken by non-stenographic means, such " 'should be used only where a manifest injustice would occur due to the expense of stenographic recording.' " *Colonial Times, Inc. v. Gasch*, 509 F.2d 517, 520, footnote 3 (D.C. Cir. 1975).

In this case, Petitioner made no showing whatsoever that he did not have the financial resources to pay for depositions to be taken by traditional stenographic

means. Indeed, while Petitioner made it clear that he did not *wish* to retain and pay for legal representation, he did not request, for good reasons, that he be allowed to proceed *in forma pauperis*. Notwithstanding his employment status, Petitioner's deposition testimony established that he is a man of considerable means and property. In his deposition, Petitioner testified that he and his wife own numerous rental properties (20 units) from which he derives a substantial income. The fact is, Petitioner *was* able to pay for a stenographic deposition, and the accommodation of his *unwillingness* to do so is not the purpose which Rule 30(b)(4) was designed to serve. On this basis alone, the district court did not abuse its discretion in denying Petitioner's Rule 30(b)(4) motion.

Further, the district court possessed wide discretion to "permit the electronic recordation of depositions [only] whenever reliability and trustworthiness of the recordation can be assured." *Barham, supra*. In his motion, Petitioner made no attempt to suggest the means by which such reliability and trustworthiness could have been assured. Furthermore, Petitioner had repeatedly demonstrated to the district court that he had difficulty following the court's prior orders with respect to the interrogatories he sought to propound. Observing that "the accuracy and integrity of the record of the deposition is of overriding concern," the district court soundly exercised its discretion in denying Petitioner's motion to tape record deposition testimony.

In his Petition to this Court, Petitioner refers to the district court's refusal to allow Petitioner to propound interrogatories to non-parties by means of a subpoena. There is ample authority to support the district court's

decision to deny Petitioner's motions to compel answers to these interrogatories.

Rule 33(a) of the Federal Rules of Civil Procedure provides, in pertinent part, that "[a]ny party may serve upon any other party written interrogatories to be answered by the party served . . . " Thus, interrogatories may not be served upon a non-party person. *Andrulonis v. U.S.*, 96 F.R.D. 43, 45 (N.D.N.Y. 1982); 4A J. Moore, *Moore's Federal Practice*, ¶33.06, at 30-33 (2d ed. 1991).

Because corporations such as Degussa and Ashland must necessarily speak through an individual, Rule 33(a) further provides that "if the party is a public or private corporation . . . , [the interrogatories may be answered] by any officer or agent, who shall furnish such information as is available to the party." The officer or agent is chosen by the corporation itself, not by the party who propounds the interrogatories. *Holt v. Southern Railway Co.*, 51 F.R.D. 296, 299-300 (E.D. Tenn. 1969); *Holland v. Minneapolis-Honeywell Regulator Co.*, 28 F.R.D. 595 (D.D.C. 1961); 4A J. Moore, supra, ¶33.07, at 33-39; 10 *Fed. Proc., L. Ed., supra*, § 26:320, at 559. *See also, International Ass'n of Machinists, Dist. 169 v. Amana Refrigeration, Inc.*, 90 F.R.D. 1, 1-2 (E.D. Tenn. 1978) (applied to unincorporated associations).

Where a particular individual is not named as a party, the proponent of the interrogatories may not select that individual and direct him to answer the interrogatories. Furthermore, with regard to corporations, the proponent may not select a particular non-party officer or agent and direct interrogatories by name to that person. *Wirtz v. I.C. Harris & Co.*, 36 F.R.D. 116, 117 (E.D. Mich. 1964);

Holland, 28 F.R.D. at 595; 10 *Fed. Proc., L. Ed., supra*, § 26:293 at 532. Thus, clearly the district court did not abuse its discretion in denying Petitioner's Motion to Compel.

B. Jury Trial.

Although the district court's ruling on Petitioner's Motion for a Jury Trial does not affect the disposition of Petitioner's claims against Degussa since they were properly dismissed by summary judgment, a brief comment on this issue is in order. First, Petitioner never made a timely demand for a jury trial regarding his complaint against Degussa under Rule 38(b) of the Federal Rules of Civil Procedure. His request for such came in a motion presumably under Rule 39(b). The granting of such a motion is within the sound discretion of the district court. *Kitchen v. Chippewa Valley Schools*, 825 F.2d 1004, 1013 (6th Cir. 1987). After reviewing the circumstances, the district court denied Petitioner's motion, reasoning as follows:

> Plaintiff's reason for now moving for a jury trial is that in the face of "Defendant's unwillingness to cooperate in discovering the truth, a trial by jury would serve better his cause." It appears from the statement in plaintiff's motion that his decision not to previously demand a jury was deliberate, and that decision has now changed because of his impression that defendant is not cooperating in discovery. Evidently, plaintiff now believes that it is a better strategy to try his case before a jury.
>
> The plaintiff did indeed have a right to a jury trial on this matter and the method for

> effectuating that right is clearly provided for in the Federal Rules of Civil Procedure. However, a right to a jury trial does not translate into a license to a jury trial based on the changing whim of the plaintiff if he has failed to comply with the requirements for a jury demand set out in the Federal rules. Additionally, the Court finds that judicial economy will be better served by trying this *pro se* plaintiff's case to the bench.

In sum, Petitioner has not offered any good reasons why the district court should have gone beyond his failure to timely demand a trial by jury required by the rule.

This is simply not a case where the plaintiff, acting *pro se*, is an unsophisticated, unlettered individual who cannot be reasonably expected to ascertain and comprehend the requirements imposed upon him by the Rules of Civil Procedure. And, while Petitioner's interpretation of these rules may not have been always accurate, Rule 38(b) is unambiguous and should have been clearly understood by an individual purporting to hold the educational credentials Petitioner claims to have.

Furthermore, Petitioner waited almost two months after Degussa filed its Answer in which to "reconsider" his earlier decision not to demand a trial by jury. The grounds expressly stated in his Rule 39(b) motion demonstrated that Petitioner's delay in making his jury demand was not due to his ignorance or inadvertence. Rather, Petitioner made the completely unfounded assertion that Degussa had been unwilling to "cooperate in discovering the truth," and therefore concluded that "a trial by jury would serve better his cause." Obviously, Petitioner's reasoning is flawed in that, even assuming *arguendo* a

lack of "cooperation" by Degussa, such would not have been cured by granting Petitioner's belated demand for a jury trial.

Thus, it was within the district court's sound discretion to deny Petitioner's request and absolutely no basis has been offered to show that the district court abused that discretion in concluding that judicial economy would best be served by having Petitioner's case tried to the court.

Further, after being granted leave to amend his complaint to add Ashland as a defendant, Petitioner filed a renewed motion for a jury trial. Since his Amended Complaint merely added Ashland as a party, however, and *did not assert any new facts or issues*, the filing of the Amended Complaint did not create a new right to a jury trial for Petitioner. *Irvin v. Airco Carbide, Inc.*, 837 F.2d 724, 726 (6th Cir. 1988).

III. THE SIXTH CIRCUIT REVIEWED THE RECORD IN THIS CASE AND CORRECTLY DETERMINED THAT THE DISTRICT COURT WAS NOT IN ANY WAY BIASED AGAINST THE PETITIONER.

Petitioner has alleged that the district court was biased toward him because the court refused to grant him everything he demanded and because the court encouraged him to retain counsel due to the complexity of the issues presented. As is the case with most of his arguments, Petitioner utterly fails to identify any facts to support his claim of bias. And, there is a good reason for this failure – there *are no* facts to support this claim. While the district court does not need defending,

Degussa feels compelled to point out that an examination of the proceedings below reveals, if anything, *a conscious effort* on the court's part to point Petitioner in the right direction. The district court's suggestion to petitioner that he retain legal counsel was grounded in his recognition that the issues raised by Petitioner's claims were far from simple, and that Petitioner would be well served to obtain legal counsel. Furthermore, as the Sixth Circuit noted, the district court "patiently explained what rules and procedures [Petitioner] needed to follow in order to fully litigate his case."

CONCLUSION

The foregoing clearly demonstrates that the petition in this case does not present any issue that warrants review by this Court. Petitioner was not unconstitutionally denied his right to trial by a jury, and he was given full and fair opportunity to pursue his claims against both Respondents. All claims were correctly decided on their merits by two lower federal courts applying Ohio law. Nor has Petitioner demonstrated a

conflict with any other decisions of *any* court. Accordingly, Respondent Degussa respectfully requests that the Petition for Writ of Certiorari be denied.

Dated this 28th day of August, 1991.

Respectfully submitted,

EDWARD KATZE*
ROSEMARY C. LUMPKINS
Counsel of Record
for Respondent Degussa
Carbon Black Corp.
CONSTANGY, BROOKS & SMITH
230 Peachtree Street, N.W.
Suite 2400
Atlanta, Georgia 30303
(404) 525-8622

*Counsel of Record

LINCOLN P. OVIATT
Attorney for Respondent
Degussa Carbon Black Corp.
CRITCHFIELD, CRITCHFIELD & JOHNSTON
225 North Market Street
Wooster, Ohio 44691
(216) 264-4444

APPENDIX A

DOWD, J.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

John Burche, Plaintiff, vs. Degussa Carbon Black Co., et al., Defendants.	)	CASE NO. 5:89CV00981 MEMORANDUM OPINION

The plaintiff John Burche (Burche) applied for and accepted employment with the defendant Ashland Chemical Company (Ashland) in March of 1988. Subsequently, the assets of Ashland were sold to the defendant Degussa Carbon Black Co. (Degussa) in the autumn of 1988. Degussa continued the employment of the plaintiff at the same salary as he had been paid by Ashland after Burche accepted Degussa's offer on employment. In March of 1989, Degussa terminated Burche's employment. Burche then filed this action, first against Degussa only and then subsequently joined Ashland as a second defendant. In the amended complaint filed by Burche in his *pro se* capacity, he seeks damages against Degussa as a result of his termination in March of 1989 and damages against Ashland for failing to purchase his home in Iowa where he was living when he accepted employment with Ashland and moved to Akron, Ohio, to his place of employment.

The defendants have filed separate motions for summary judgment (docket ## 85 and 144) and the plaintiff has filed his brief in opposition (docket # 147). For the reasons that follow, the motion of Degussa for summary judgment is granted and the motion of Ashland is denied.

II. SUMMARY JUDGMENT LAW.

It is well established that when considering a motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, "the inferences to be drawn from the underlying facts contained in [affidavits, pleadings, depositions, answers to interrogatories, and admissions] must be viewed in the light most favorable to the party opposing the motion." *U.S. v. Diebold*, 369 U.S. 654, 655 (1962); *United States v. Hodges X-Ray, Inc.*, 759 P.2d 557 (6th Cir. 1985); *Tee-Pak, Inc. v. St. Regis Paper Co.*, 491 F.2d 1193 (6th Cir. 1974); *Bohn Aluminum & Brass Corp. v. Storm King Corp.*, 303 F.2d 425 (6th Cir. 1962). However, the non-moving party bears the responsibility to demonstrate that summary judgment is inappropriate under Rule 56(e). The "adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or otherwise . . . , must set forth specific facts showing there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him." Fed. R. Civ. P. 56(e).

A court may grant summary judgment only if there are no issues of material fact in dispute and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). "[T]he judge's function is not himself to weigh the evidence and determine the truth of the matter

but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). "[T]here is no issue for trial unless there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party." *Id.* (citing *Adickes v. S. H. Kress & Co.*, 398 U.S. 144 (1970); *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. at 258 (1968)). Therefore, "[i]f the evidence is merely colorable, . . . , or not significantly probative, summary judgment may be granted." *Id.* at 249-250 (citing, *Dombrowski v. Eastland*, 387 U.S. 82 (1967) (*per curiam*); *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. at 290). " 'The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff.' " *Street v. Bradford & Co.*, 886 F.2d 1472, 1477 (1989) (quoting, *Anderson v. Liberty Lobby*, 477 U.S. at 252). Moreover, summary judgment is appropriate when the non-moving party "has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

In sum, "[t]he inquiry performed is the threshold inquiry of determining whether there is the need for a trial – whether, in other words, there are any genuine issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson*, 477 U.S. at 250.

III. THE DEGUSSA MOTION.

Burche's claim of an unlawful termination by Degussa is based on his assertions of oral commitments

made to him at the time he was hired by Ashland coupled with the allegation that Degussa is bound by the conditions under which Burche was employed by Ashland. However, Burche is unable to escape the impact of his signed application for employment with Ashland,[1] the subsequent Service Agreement he signed after offered employment by Ashland,[2] and his own deposition

---

[1] Prior to beginning his interviews with Ashland, Burche was submitted and signed an employment application which stated in pertinent part:

> "... I further acknowledge that my employment may be terminated and any offer of employment or my acceptance of any employment offer, if such is to occur, may be withdrawn with or without cause and with or without prior notice at any time at the option of the Company or myself. I understand that no representative of the Company other than a vice-president or a higher level officer of the Company *by acknowledgment in writing*, has any authority to enter into any agreement for employment for any specified period of time or to *assure any other personnel action*, either prior to commencement or after I have become employed, or *to assure any benefits or terms or conditions of employment*, or make any agreement contrary to the foregoing."

[2] The Service Agreement contained the following language in capital letters:

> THAT THIS AGREEMENT DOES NOT GUARANTEE CONTINUATION OF EMPLOYMENT FOR ANY PERIOD AFTER HIRE DATE; THAT I RESERVE THE RIGHT TO TERMINATE MY EMPLOYMENT AT ANY TIME FOR ANY REASON; AND THAT ASHLAND RESERVES THE RIGHT TO TERMINATE MY EMPLOYMENT AT ANY TIME FOR ANY REASON.

testimony in which he conceded that none of the oral promises or commitments alleged in his complaint to have been made by Ashland were ever made, ratified or assumed by Degussa. To the contrary, the undisputed fact is that Burche was an employee-at-will for Degussa and therefore subject to discharge at any time. *Phung v. Waste Management, Inc.*, 23 Oh. St. 3rd 100 (1986) teaches that an employee hired for an indefinite term is an employee at will and may be discharged at any time with or without cause.

Degussa acknowledges that Burche's legal theory of recovery against it is based on novation. *See* Burche's deposition, pages 375-377. *Meredith v. Rockwell International Corporation*, 826 F.2d 463 (6th Cir. 1987) contains an exhaustive discussion of novation as it is applicable to employment situations. *Assuming arguendo* that Ashland's management made oral promises to Burche binding under the theory of equitable estoppel, those promises are not transferred to the subsequent employer, Degussa absent the essential elements of a common understanding and consent to the alleged earlier promises of Ashland. Burche has failed to come forward with even a scintilla of evidence that Degussa knew about the alleged oral promises made by Ashland to him. Additionally, the only inference to be drawn from Burche's deposition testimony is that he never discussed with anyone at Degussa the promises he alleged were made to him by Ashland when he began his employment. Burche Deposition, p. 321-329.

In sum, the court finds no basis upon which Burche is able to maintain his claim that he was wrongfully discharged by Degussa. As a consequence, summary judgment in favor of Degussa Follows.

III. THE ASHLAND MOTION.

Burche asserts in his amended complaint that Ashland promised that it would pay the difference in price between market value and the cost price of his home in Davenport, Iowa, which was in a depressed area. Burche included other promises which he declares Ashland violated, but none of the promises involve compensatory damages and Burche makes no claim that his termination by Degussa was caused by or the fault of Ashland. The issue that emerges, assuming arguendo the truthfulness of Burche's allegations is whether the doctrine of promissory estoppel in the context of oral employment at will agreements as recognized by *Mers v. Dispatch Printing Company*, 19 Ohio St. 3rd 100 (1985) is arguable binding and applicable in this case. Burche asserts that it is and Ashland in reliance on the deposition testimony of Burche, asserts to the contrary. After reading Burche's deposition, the court declines to enter summary judgment for Ashland and will set the case for trial on the sole issue of whether Burche is entitled to compensatory damages and if so, in what amount on his claim that Ashland

promised to pay him the difference "between market value and the cost price" of his home in Davenport, Iowa.

Ashland's motion for summary judgment is denied.

IT IS SO ORDERED.

/s/ David D. Dowd, Jr.
David D. Dowd, Jr.
U.S. District Judge

DOWD, J.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

John Burche, Plaintiff, vs. Degussa Carbon Black Co., et al., Defendants.	)	CASE NO. 5:89CV00981 JUDGMENT ENTRY

For the reasons set forth in the Memorandum Opinion filed contemporaneously with this Judgment Entry, IT IS HEREBY ORDERED, ADJUDGED, and DECREED that summary judgment is granted for defendant Degussa Carbon Black Company and against plaintiff John Burche. Each party to bear its own costs.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that defendant Ashland Chemical Company's motion for summary judgment against the plaintiff is denied.

/s/ David D. Dowd, Jr.
David D. Dowd, Jr.
U.S. District Judge

APPENDIX B

2ND CASE of Level 1 printed in FULL format.

JOHN BURCHE, Plaintiff-Appellant,
v. ASHLAND CHEMICAL COMPANY;
DEGUSSA CARBON BLACK COMPANY,
Defendants-Appellees

No. 90-3641

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

1991 U.S. App. LEXIS 4707

March 19, 1991, Filed

NOTICE: [*1]

NOT RECOMMENDED FOR FULL TEXT PUBLICATION SIXTH CIRCUIT RULE 24 LIMITS CITATION TO SPECIFIC SITUATIONS. PLEASE SEE RULE 24 BEFORE CITING IN A PROCEEDING IN A COURT IN THE SIXTH CIRCUIT. IF CITED, A COPY MUST BE SERVED ON OTHER PARTIES AND THE COURT. THIS NOTICE IS TO BE PROMINENTLY DISPLAYED IF THIS DECISION IS REPRODUCED.

SUBSEQUENT HISTORY: Reported as Table Case at 928 F.2d 404, 1991 U.S. App. LEXIS 8514.

PRIOR HISTORY:

On Appeal from the United States District Court for the Northern District of Ohio; No. 87-00981; Dowd, Jr., Judge.

JUDGES: Martin and Milburn, Circuit Judges, and Engel, Senior Circuit Judge.

OPINION: ORDER

John Burche, a pro se Iowa resident, appeals the district court's dismissal of his amended civil complaint for breach of contract and wrongful discharge. The case has been referred to a panel of the court pursuant to Rule 9(a), Rules of the Sixth Circuit. Upon examination of the briefs and the record, this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

In March 1988, Burche was hired as a research manager for Ashland's carbon black division in Akron, Ohio. Burche relocated from Iowa to Ohio. In November 1988, Ashland sold its carbon black division to defendant Degussa. Burche accepted an offer of employment from Degussa, but he was [*2] ultimately terminated from that position on March 22, 1989. Seeking monetary relief, Burche filed suit alleging that Ashland did not honor its oral promise to pay the difference between the market price of his Iowa home and the costs he expended in acquiring the home, and that Degussa wrongfully terminated his employment.

Both defendants filed motions for summary judgment and Burche responded. The district court granted summary judgment for Degussa, finding that Burche was an employee at will and that there was no evidence that Degussa ever ratified or assumed the alleged oral promises made to Burche by Ashland. However, the district court denied Ashland's motion for summary judgment and set the case for trial to determine whether or not Burche was entitled to compensatory damages under a theory of promissory estoppel. A bench trial was ultimately held, during which the court granted Ashland's motion for an involuntary dismissal under Fed. R. Civ. P. 41(b) after the close of Burche's evidence. The court also

issued findings of fact and conclusions of law pursuant to Rule 52(a). Specifically, the court found that Burche had not made out a claim for promissory estoppel because he was [*3] not injured by reliance on Ashland's alleged promise. The court reasoned that Burche had not sold the house in Iowa, and therefore did not incur any loss. The court also found that it was foreseeable that Ashland would sell its carbon black division to another company and that that company would terminate Burche.

On appeal, Burche reasserts his claims and additionally argues that the district court improperly limited his discovery; that he was improperly denied a jury trial; and that the trial judge was biased against him.

Upon review, we affirm the district court's summary judgment dismissal of Degussa for the reasons stated in the court's opinion dated March 6, 1990. We also conclude that the district court properly granted Ashland's motion for an involuntary dismissal under Fed. R. Civ. P. 41(b). The court's findings of fact are not clearly erroneous and they support the court's conclusion that Burche had not made out a claim for promissory estoppel. See Anderson v. City of Bessemer City, 470 U.S. 564, 573 (1985); Haskell v. Washington Township, 864 F.2d 1266, 1274 (6th Cir. 1988).

The district court also did not abuse its discretion in limiting [*4] Burche's discovery request because the only relocation information pertinent to Burche's case was that information pertaining to newly hired employees. See Chrysler Corp. v. Fedders Corp., 643 F.2d 1229, 1240 (6th Cir. 1980), cert. denied, 454 U.S. 893 (1981). The district court also properly denied Burche's request for a jury

trial because he did not make a timely jury demand in his complaint or within ten days after the defendants filed their answer. See Fed. R. Civ. P. 38(b). Nor did the amended complaint contain any new issues which could have revived Burche's right to a jury trial. See Irvin v. Airco Carbide, Inc., 837 F.2d 724, 727 (6th Cir. 1987). Finally, the district court was not biased against Burche because he was proceeding pro se. To the contrary, the court patiently explained what rules and procedures Burche needed to follow in order to fully litigate his case.

Accordingly, the district court's judgment is hereby affirmed pursuant to Rule 9(b)(5), Rules of the Sixth Circuit.

(3)

No. 91-175

Supreme Court, U.S.
FILED
AUG 27 1991
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

JOHN BURCHE, PETITIONER

v.

DEGUSSA CARBON BLACK CO. and
ASHLAND CHEMICAL CO.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT ASHLAND CHEMICAL CO. IN OPPOSITION

Thomas W. Hill
Counsel of Record for Respondent
Ashland Chemical Co.
Emens, Hurd, Kegler & Ritter Co., L.P.A.
Capitol Square
65 East State Street
Columbus, Ohio 43215

QUESTIONS PRESENTED

1. Was the United States Court of Appeals for the Sixth Circuit correct in holding that the district court properly granted Ashland's motion for an involuntary dismissal of petitioner's claims under Fed. R. Civ. P. 41(b)?

2. Was the Sixth Circuit correct in finding that the district court did not abuse its discretion in: limiting petitioner's discovery requests, denying petitioner's untimely request for a jury trial, and finding that the district court was not biased against petitioner because he was proceeding pro se?

PARTIES TO THE PROCEEDING

The petitioner is John Burche, an individual resident of Davenport, Iowa. Respondents are Degussa Carbon Black Co. and Ashland Chemical Co. Degussa Carbon Black Co. is a subsidiary of Degussa AG, which is publicly traded on the Frankfurt, Germany Exchange. Ashland Chemical Co., at the time of the events in question in this case, was a division of Ashland Oil, Inc. and is now a wholly owned subsidiary of Ashland Oil, Inc., which is a publicly owned corporation.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED. i

PARTIES TO THE PROCEEDING. ii

TABLE OF AUTHORITIES iii

STATEMENT OF FACTS 1

ARGUMENT 5

TABLE OF AUTHORITIES

Cases:

Regents of University of Michigan v. Ewing, 474 U.S. 214, 224, n. 10 (1985). 8,9

Virginia v. American Booksellers Ass'n, 484 U.S. 383, 395 (1988). . 9

Rules:

Fed. Rule Civ. P. 41(b). i

Supreme Court Rule 10. 7,8

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

JOHN BURCHE, PETITIONER

v.

DEGUSSA CARBON BLACK CO. and
ASHLAND CHEMICAL CO.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT ASHLAND CHEMICAL CO. IN OPPOSITION

STATEMENT OF FACTS

In 1988, petitioner, John Burche was working for a company called Bandag, Inc. in Davenport, Iowa. That same year, petitioner interviewed with representatives from Ashland Chemical Company's Carbon Black Division (hereinafter "Ashland") in Akron, Ohio. Before commencing the interview process, Petitioner read and signed an employment

application in which he acknowledged that no representative of Ashland could offer him any benefits or terms and conditions of employment other than in writing. Petitioner admitted that he read and understood that acknowledgment before he signed it and knew that he was bound by it. Ashland thereafter confirmed in writing an offer of employment to Petitioner. Included among the terms of that written confirmation was Ashland's written relocation policy.

Ashland's written relocation policy provided that Ashland would assume certain relocation costs where a particular employee chose to follow the required procedures. The policy allowed Petitioner the option of having a Relocation Management Company purchase his home at a cost determined by the median of two appraisals obtained on his home. Petitioner accepted that option in

writing. As a result, two independent appraisals were conducted on Petitioner's home in Davenport, Iowa. One of the appraisals was for $64,000.00 and the other was for $61,500.00. The median price was therefore $62,750.00.

Petitioner rejected the Relocation Management Company's offer of $62,750.00 and also rejected a subsequent offer of $70,000.00, deciding instead to keep the house. Petitioner continued to work for Ashland until November 1988, when Ashland sold its Carbon Black Division to DeGussa. Thereafter, Petitioner continued to work for Degussa until March 1989. After he was terminated by DeGussa, Petitioner moved back to that house in Davenport, Iowa, where he now lives.

After his termination by DeGussa, Petitioner filed suit claiming that an Ashland Vice President, Mr. Reed, orally promised petitioner that Ashland would pay

him the difference between the Petitioner's cost in the house and the actual sale price of the house. This was despite the fact that Petitioner admitted that he had read, understood, signed, and was bound by his employment application which, as the district court found, indicated on its face that Burche could not rely upon any alleged oral promises.

Petitioner alleged at trial, without any supporting documentation, that he had spent in excess of $114,000 on his home. This undocumented claim was belied by the fact that the bank that issued the loan to Petitioner to build the house in 1979 had appraised the fair market value of the house at the time at $70,000.

The district court held that Burche failed as a matter of law to prove the fourth element of promissory estoppel under Ohio law: proof that the party asserting the estoppel was injured by the

reliance. The Court held that because Petitioner never sold his Davenport, Iowa home, he has not incurred any loss resulting from the alleged oral promise that Petitioner claimed was made to him. Indeed, Petitioner continued to live in that house through the trial of this case.

The "Amended Value Sales Option" to which Petitioner makes reference provided that:

> The offer price by the Relocation Management Company can be amended to match a bona fide written sales agreement from a third party to purchase your property at a price higher than the original offer submitted.

However, Burche never received any bona fide written sales agreement from any third party to purchase his home at a price higher than the $61,500 offered to him by the Relocation Management Company.

ARGUMENT

The petition for a writ of certiorari

in this case represents nothing more than dissatisfaction with the outcome of a lawsuit. The decisions of both the district court and the court of appeals result from the routine application of non-controversial, garden variety state law principles. This case, therefore, presents nothing that merits review by this Court.

The decision of the United States Court of Appeals for the Sixth Circuit in this case does not conflict with any decisions of other federal appellate courts. Likewise, this case does not present a situation of departure from the accepted and usual course of judicial proceedings on the part of either the district court or the court of appeals. Nor does the decision of the United States Court of Appeals in this case conflict with any of the decisions of this Court or present any important question of federal

law warranting review by this Court. In short, the petition for a writ of certiorari in this case does not satisfy any of the reasons set forth in Sup. Ct. R. 10, and in fact the petition does not even address any of the reasons set forth in that rule.

The district court denied plaintiff/petitioner's request for irrelevant discovery, as well as his untimely request for a jury trial. Both of those rulings were within the discretion of the district court, and the Sixth Circuit found that such rulings were not "clearly erroneous." Petitioner's claims of bias by the district court judge are spurious. As the Sixth Circuit stated in rejecting this contention:

> To the contrary, the court patiently explained what rules and procedures Burche needed to follow in order to fully litigate his case.

Petitioner's only substantive legal claim

is his state law claim that promissory estoppel entitles him to relief, despite the lack of any actual damages. The lack of damages alone justified the dismissal of Petitioner's this claim. Likewise, the fact that Petitioner admitted that he signed a document acknowledging that he could not rely on any oral promises bars his claim as a matter of law based on state law defenses of waiver and estoppel. In any event, Petitioner's claim raises strictly questions of state law, and no federal questions are implicated.

The Supreme Court rules make clear that "review on a writ of certiorari is not a matter of right, but of judicial discretion." Sup. Ct. R. 10. In exercising this discretion, this Court has historically accorded great deference to decisions of the lower federal courts regarding state law. Regents of University of Michigan v. Ewing, 474 U.S.

214, 224, n. 10 (1985); Virginia v. American Booksellers Ass'n, 484 U.S. 383, 395 (1988). Here, the district court and court of appeals found on the admitted facts that Petitioner's claim based upon promissory estoppel fails as a matter of state law. Other than expressing his disagreement and disappointment with that result, Petitioner offers no cogent reason why this Court should review that decision.

CONCLUSION

Nothing in the petition for writ of certiorari presents a valid reason for granting review in this case. The decisions of the lower federal courts are correct on the merits, and there are no conflicts with decisions of this Court or with decisions of the federal circuit courts of appeal. In consideration of the foregoing, respondent Ashland Chemical Company respectfully requests that the

Petition for a Writ of Certiorari be denied.

Date: August 27, 1991

Respectfully submitted,

Thomas W. Hill

Thomas W. Hill
Counsel of Record for
Respondent Ashland Chemical
Company
Emens, Hurd, Kegler &
Ritter Co.
Capitol Square
65 East State Street
Columbus, Ohio 43215